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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

REPLY BRIEF OF PETITIONER.

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JURISDICTION.

Writ of Certiorari in This Case Was Not Improvidently Granted.

(a) Respondents, in urging that the Court of its own motion dismiss the writ of certiorari, cite and rely upon the decision of this Court in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 206, wherein the Court said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opin-

ion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.'"

The Court of Appeals of the Eighth Circuit, in the *Magnolia case* under review, and the Court of Appeals of the Seventh Circuit, in the *Carter Oil Company case* (see *Appendix to Brief of Petitioner*) do not predicate their respective decisions upon the laws of different states, but both decisions attempt to construe the *Illinois Conveyance Act* and the authoritative decisions of the State of Illinois with respect to an Illinois conveyance. The conflict, therefore, is not merely corollary to a permissible difference of opinion between different state courts. Both decisions attempt to analyze the situation in the light of the Illinois statutes and cases, and the Circuit Court of Appeals of the Seventh Circuit, in the *Carter Oil Company case* has specifically found that the Court of Appeals of the Eighth Circuit, in the *Magnolia case*, under review, has decided an important question of local Illinois law in a way in conflict with applicable local decisions.

The intolerable situation growing out of this conflict is not one of mere theory. Petitioner is confronted with a situation where title to oil rights on other adjacent right-of-way property involving in excess of a half million dollars will depend entirely on whether the litigation can be forced to trial in the United States Court at St. Louis, Missouri, or in the United States Court in East St. Louis, Illinois.

This direct conflict between the decisions of different circuits both respecting Illinois conveyances, the great loss that will result from delay, and the fact that substantial property rights must be immediately determined under one or the other of these conflicting decisions amply justi-

fied the granting of certiorari in this case, especially where the decision sought to be reviewed has so obviously decided an important question of local law "in a way *probably* in conflict with applicable local decisions."

It is true that the Court of Appeals of the Seventh Circuit in the Carter Oil Company case has not yet passed upon the motion for rehearing, and it seems quite apparent that said Court will withhold its ruling on said motion pending this Court's decision in the Magnolia case here under review. It is not necessary that the motion for rehearing be disposed of to make the decision final (*Southern Railway Co. v. Clift*, 260 U. S. 316, 318). Furthermore, even if the decision in the Carter Oil Co. case be not final, it brings to the attention of this Court the very apparent fact that the decision in the Magnolia case under review "has decided an important question of local law in a way *probably* in conflict with applicable local decisions," which is of itself sufficient to warrant this Court retaining jurisdiction.

(b) Among the grounds for certiorari recognized by this Court's *Rule No. 38* is the fact that the Circuit Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way probably in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision."

In the first sentence of *brief of respondents*, it is stated that "there are no matters of general importance respecting the jurisdiction of the bankruptcy court involved." We respectfully submit that there is involved the right of the bankruptcy court as a preliminary inquiry to determine its own jurisdiction to proceed to examine and decide in a summary proceeding the merits of an adverse claim.

If its jurisdiction depended upon the actual or constructive possession of the *res* by the debtor's trustee, then the Court had a right to determine this question and to make necessary orders to conserve the fugitive subject matter of the litigation pending appeal from the decision on the issue of possession. The oil was therefore removed and conserved under and pursuant to a decree of a court having competent jurisdiction to determine the question of possession, and it was not removed and sold under a void decree of a court which had no jurisdiction whatsoever. If the Court had jurisdiction to determine the question of possession, the jurisdiction to determine that question carried with it the right to conserve the subject matter of the litigation pending its determination, and the jurisdiction to proceed to this extent was not retroactively nullified by the decision of the Court of Appeals to the effect that the District Court's decision respecting possession was wrong. If the Court had jurisdiction to proceed, but wrongly determined the issue of possession, the remedy would be *restitution* and not damages for *conversion*. Restitution proceeds upon the theory that what has been done pursuant to the orders of a court of competent jurisdiction is lawfully done, but that the unsuccessful litigant cannot retain the benefits acquired under such wrongful order.

The Court of Appeals in the case under review directed the lower court to dismiss the proceedings "for want of jurisdiction". (R. 157). Opposing counsel contend that "the bankruptcy court was acting without jurisdiction, and all of its orders were void and in excess of and beyond its jurisdiction" (*Respondents' Brief*, p. 51). It is our contention that the Court did have jurisdiction to determine the question of possession, and the decision of the Appellate Court did not make void that which was lawfully, even though wrongly, done by the lower court.

If we are wrong on the merits of this controversy, it is an important matter arising under the bankruptcy law for this Court to determine whether the lower court had jurisdiction, pending determination of the question of possession and pending review by the Appellate Court of its decision on that issue, to take action to conserve the subject matter of the suit. And it is equally important for this Court to determine whether the action taken in this respect by the lower court exceeded the exercise of sound discretion.

For the reasons aforesaid, we respectfully submit that this Court should disregard request of respondents that the writ of certiorari be dismissed as improvidently granted.

REPLY TO RESPONDENTS' ARGUMENT ON THE MERITS.

Under the specific terms of Sections 9 and 13 of the *Illinois Conveyance Act* as set forth on pages 12 and 13 of petitioner's original brief, deeds following the form and language of those in question pass a fee-simple estate of inheritance "if a less estate be not limited by express words or do not appear to have been granted, conveyed or devised by construction or operation of law"; and in determining whether language following the grant is a limitation or a mere description of the intended use, all doubts must be resolved in favor of the unrestricted use and in favor of the grantee (*Original Brief*, pp. 13 and 14).

Opposing counsel beg the real question at issue by assuming that the faces of the deeds disclose no ambiguity or doubt, but, on the contrary, clearly evidence an intended conveyance of a mere right of way easement. They rest this contention solely upon the following groups of words appearing in the deeds, to wit: "*a strip of ground*," "*for right of way*," "*over and across*" (*Respondents' Brief*, p. 22).

Since the Illinois law permits a carrier to acquire the fee-simple absolute title to a strip or gore of land on which its railroad is to be situated, the mere narrowness of such a strip over and across acreage property does not of itself indicate an intention to restrict the grant to an easement. The applicable statutes and decisions to this effect are cited on page 12 of original brief of petitioner.

The use of the words "*over and across*" have no significance one way or another. We have fully discussed this on pages 31 to 34, inclusive, of our original brief.

This leaves for consideration the words "*for right of way*," as used in the phrase "*a strip of land for right of way*." We are thus brought back to the real issue in this

case, namely, do the words "for right of way" following the description of the grant as a strip of land constitute a limitation of the use for right of way only, or is it merely descriptive of the intended use for the purpose of locating the particular strip of land conveyed? The description in the deed was indefinite, but was made definite by the location of the railroad (*C. & A. Ry. Co. v. Langer*, 288 Ill. 16, 123 N. E. 61). The conveyance of a strip of land sixty feet wide across acreage property might be void for uncertainty were the location not described by its intended use as a railroad right of way. It becomes definite when the road is constructed and the right of way fenced. It was necessary to refer to the use for the purpose of locating the particular strip, and the description of the intended use is not necessarily to be construed as a limitation or restriction of the use. We therefore have exactly the kind of an ambiguous deed to which the rules of construction first above mentioned are to be applied, and according to these rules the conveyance is a fee-simple estate of inheritance with any ambiguity respecting the limitations of use resolved in favor of the grantee and in favor of the unrestricted use.

How can it be argued that the words "*for right of way*," as so used, evidence an intention to convey a mere railroad easement? Such a contention begs the question and does violence to the specific provisions of the *Illinois Conveyance Act* and the applicable decisions cited on pages 16 et seq. of our original brief. Quite obviously, to say that a mere right of way easement will accomplish the purpose intended is to assume that the purpose intended is to limit the use to right of way purposes. But how do we know that the purpose intended in the use of the phrase "*for right of way*" was to limit the use to right of way purposes rather than merely to describe the intended use for the purpose of locating the particular sixty-foot strip conveyed? We do not know it from anything ap-

pearing on the face of the deed, and such a conclusion ignores the authoritative Illinois decisions and statutes on which we have so strongly relied.

The logical steps that should be considered are: Do the words "*for right of way*," following the description of the grant, constitute a *limitation* or merely a *description* of the use? If merely a description of the use, then the conveyance is of the fee simple absolute. If it be a limitation of the use, we must then further inquire: Will the right-of-way easement accomplish the same purpose as a grant of the fee limited in duration and use to railroad right-of-way purposes? If it does, the deed conveys an easement. If it does not answer the same purpose, the conveyance is of a base or determinable fee. It will not do to say that an easement will accomplish the same purpose as the fee-simple absolute title. It will not. This is recognized by the fact that a railroad is permitted to acquire the fee to the land on which its right of way in Illinois is situated. A contrary conclusion would signify that a railroad company could never acquire the fee because it would not need the fee for right-of-way purposes. This is not the law in Illinois, although it may be the law in Kansas and was once the law in Missouri.

We therefore respectfully insist that in determining whether the words "*for right of way*" in the conveyances in question are merely descriptive of the intended use, we must apply the analogous Illinois decisions set out on pages 16 *et seq.* of our original brief, and we cannot nonchalantly brush these decisions aside with the casual comment that they are not applicable to easements. An easement signifies a limitation of the duration and use to an even greater extent than does a base or determinable fee. If the language "*for right of way*" cannot be construed as a limitation of the duration and the use to railroad right-of-way purposes, then how can it be construed as creating an easement?

There is no decision in Illinois that justifies any such contention. On the other hand, there are several well-considered authoritative decisions cited on pages 16 et seq. of our original brief which specifically hold that such a description of the intended use following the grant cannot be construed as a limitation of the free and unrestricted use—in other words, it cannot be considered as limiting the conveyance in such a manner as to make it a mere right-of-way easement or any other estate less than the unrestricted fee absolute. The fallacy of respondents' arguments lies in their contention that the words "*for right of way*" signify a limitation of the use for right-of-way purposes, whereas such a construction is in direct conflict with the provisions of the *Illinois Conveyance Act* and with the Illinois decisions on which we have so confidently relied in our original brief.

In *Noyes v. St. L. A. & T. H. R. Co.*, 21 N. E. 487 (Ill.), the grant was of "*a strip of land 4,000 ft. long and 350 ft. in width*" for "*general railroad purposes.*" The Court held that this description of the intended use did not limit the grant. By analogy, can it be argued that the conveyance of a *strip of land 60 feet wide* for *right of way* limits the use to mere easement purposes? Had the conveyance been of a mere right of way, the right of way could be used for yards, side tracks, and general railroad purposes (*Walker v. I. C. R. Co.*, 215 Ill. 610, 74 N. E. 821). What, then, is the distinction between the conveyance of a strip of land "*for right of way*" and the conveyance of the same strip of land "*for general railroad purposes*"? We fail to see any distinction. The conveyance in each instance is of the strip of land, and the designation of the intended use does not limit the grant to an easement. The fact that the Supreme Court of Illinois has never attempted to draw a distinction between the conveyance of *a strip of land for right of way* and the conveyance of *a strip of land for*

general railroad purposes is of no consequence. It might just as consistently be argued that, because the Supreme Court has not passed upon a contract for the sale of *a white horse*, the decision respecting the sale of *a black horse* under the same terms and conditions would not be controlling. Whether the description be "*for right of way*" or "*for general railroad purposes*," it is in either event a mere description of the same intended use for which the strip of land to which the railroad company may legally acquire fee-simple absolute title is conveyed.

Waller v. Hilderbrecht, cited on page 19 of respondents' brief, and *Sullivan v. Eddy*, cited on page 31 of respondents' brief, are discussed and distinguished on pages 28 to 31, inclusive, of original brief of petitioner, and need no further discussion. Other points raised by respondents have been anticipated and fully answered in our original brief.

Respectfully submitted,

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